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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 110

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI, FILED JUNE 7, 1935

CERTIORARI GRANTED, OCTOBER 14, 1935

SUPREME COURT OF THE UNITED STATES

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1 [Captions omitted.]

In United States District Court, District of Massachusetts

No. 5841, Law Docket

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES U/W Edward E. Blodgett, petitioners

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition

Filed December 29, 1933

The petitioners say:

FIRST. That they are residents of Boston and Brookline, respectively, in the district of Massachusetts, and that they are, and were at all times hereinafter referred to, the trustees under the will of Edward E. Blodgett, late of Newton in said district.

SECOND. That as such trustees they duly filed, within the time prescribed by law and the regulations of the Commissioner of
2 Internal Revenue, a return of their income as such trustees for the calendar year 1928, said return being filed in the office of Thomas W. White, the then collector of internal revenue for said district.

THIRD. That within the time prescribed by law they duly paid to said collector the tax shown by said return to be due.

FOURTH. That thereafter the Commissioner of Internal Revenue erroneously and without warrant in law assessed against your petitioners an additional income tax of $4,500.26 with respect to their income for said year, which additional assessment, together with the interest thereon amounting to $544.47, was paid by your petitioners on April 3, 1931, to said collector pursuant to notice and demand, which collector, as your petitioners are informed and believe and therefore say, in turn turned it over to the United States.

FIFTH. That a part of said additional assessment was based upon the erroneous inclusion by the Commissioner as a part of the taxpayer's net income subject to normal and surtaxes of net profits amounting to $74,773.03 from the sale of securities, which securities your petitioners say had been "held by them" for more than two years and constituted "capital assets" within the meaning of those words as used in section 101 of the Revenue Act of 1928, and which net profits your petitioners say constituted a "capital net gain" and, as your petitioners had elected, were taxable as such under said section.

SIXTH. That the balance of the additional assessment was based upon the erroneous disallowance by the Commissioner of deductions amounting to $8,752.85 from their net income, which deductions represented the amount of the net income of the trust for said tax-

able year which was "to be distributed currently" by the petitioners to the beneficiary, Mabel F. Blodgett, the widow of the said Edward E. Blodgett, to which deduction your petitioners say they were entitled under the provisions of section 162 (b) of the Revenue Act of 1928.

SEVENTH. That within the time prescribed by law, to wit, on July 29, 1931, your petitioners duly filed with the collector of internal revenue for the district of Massachusetts a claim for refund, copy of which is hereto annexed, which claim was disallowed in its entirety by the Commissioner on January 22, 1932.

3 EIGHTH. That said Thomas W. White has since resigned his office as said collector, and on September 1, 1933, Joseph P. Carney became the collector of internal revenue for said district.

NINTH. That your petitioners are advised and therefore aver that the collection from them of the said additional assessment and interest amounting to $5,044.73 on April 3, 1931, was illegal, erroneous, and unlawful, and that there is justly due and owing to them from the United States on account of the matters hereinbefore set forth the said sum, with interest thereon at the rate of six per centum per annum from April 3, 1931, as provided by law.

TENTH. That your petitioners have made no assignment or transfer of their said claim or any part thereof and that there are no credits or offsets due from them to the United States and that they have at all time shown true allegiance to the Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Wherefore your petitioners pray judgment against the United States for $5,044.73 with interest at six per centum per annum from April 3, 1931, as provided by law, and for their costs in this suit.

THE FIRST NATIONAL BANK OF BOSTON and
MABEL FULLER BLODGETT,
Trustees u/w Edward E. Blodgett,
By GEORGE S. FULLER, *Its Attorney.*

[*Duly sworn to by George S. Fuller, jurat omitted in printing.*]

4 *Exhibit to petition*

CLAIM TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[X] Refund of tax illegally collected.

STATE OF MASSACHUSETTS,
County of Suffolk, ss:

Name of taxpayer or purchaser of stamps The First National Bank of Boston et als., trustees u/w of Edward E. Blodgett.

Business address, 17 Court Street, Boston, Massachusetts.

Residence (please address communications c/o George S. Fuller, 1 Federal Street, Boston, Mass).

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed, Boston, Mass.

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1928, to Dec. 31, 1928.

3. Character of assessment or tax Additional Income Tax.

4. Amount of assessment, $4,500.26; dates of payment, April 3, 1931.

5. Date stamps were purchased from the Government.

6. Amount to be refunded, amount paid on 4/3/31, $5,044.73, with interest since that date.

7. Amount to be abated (not applicable to income or estate taxes).

8. The time within which this claim may be legally filed expires, under section 322 of the Revenue Act of 1928, on April 3, 1933.

The deponent verily believes that this claim should be allowed for the following reasons:

A. That the transfer by the Commissioner, in taxpayer's income-tax return for 1928, of profits of $74,773.03 from capital net gain to ordinary income was without authority of law, for the reason that the securities which were the subject of said gain were "capital assets" in the hands of the taxpayer within the meaning of section 101(c)(8) of the Revenue Act of 1928. This question was the subject of a formal protest dated July 7, 1930, filed with the internal-revenue agent in Boston, on which a hearing was had. This protest was overruled by Department letter dated February 19, 1931 (IT: AR: B–1 SMC–60D).

B. That the taxing to the taxpayers of income for the year 1928 in the amount of $8,752.85, distributed to Mabel F. Blodgett (said income admitted by the Commissioner to be nontaxable to said Mabel F. Blodgett because taken by her in lieu of dower rights and therefore constituting return of capital) was without authority of law.

C. That the assessment of said additional tax of $4,500.26 and interest was further without authority of law for the following reasons:

Taxpayers' income-tax return for the year 1928 was filed on or about March 15, 1929.

In accordance with the provisions of section 272 (a) of the Revenue Act of 1928 notice of deficiency of income tax for the year 1928 in the amount of $4,500.26, was mailed to taxpayers, said notice being dated February 19, 1931.

In accordance with the provisions of section 272 (d) of said act, on March 6, 1931, attorney for taxpayers sent by registered mail to the Commissioner of Internal Revenue at Washington, waiver of right to appeal to the Board of Tax Appeals and waiver of the re-

strictions provided for in section 272 (a) of the Revenue Act of 1928, to the assessment and collection of said alleged deficiency. Postal receipt for said registered letter shows receipt of the waiver by the Commissioner's office on March 9, 1931, before the expiration of two years from the date the return was filed.

Taxpayers contend that the filing of said waiver cancelled the suspension on the running of the statute of limitations provided for in section 277 of the Revenue Act of 1928 and made it incumbent upon the Commissioner to assess any deficiency within two years from the date the return was filed—as provided in section 275 (a) of said act. The taxpayers have been informed by the Commissioner, however, that the assessment of the deficiency was made on March 21, 1931, more than two years from the date the return was filed.

6 The return was filed by the above-named fiduciaries and their appointment is still in force and they are acting as such.

THE FIRST NATIONAL BANK OF BOSTON,
Trustee.

By H. N. ANDREWS,
Trust Officer for Self and/or Cotrustees.

Sworn to and subscribed before me this twenty-eighth day of July, 1931.

[SEAL] EVELYN L. SHEEHY,
Notary Public.

In United States District Court

Answer

Filed February 14, 1934

Now comes the respondent in the above-entitled action and for its answer to the petition on file herein denies each and every mat'rial allegation, item, count, and particular in said petition contained.

By its attorney,

FRANCIS J. W. FORD,
United States Attorney.
By J. M. LEINENKUGEL,
Special Assistant to the United States Attorney.

In United States District Court

Statement of agreed facts

Filed March 16, 1934

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be takes as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and

further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. Edward E. Blodgett, late of Newton, Massachusetts, died April 4, 1926, leaving the will, a copy of which is hereto annexed and made a part hereof, which will was allowed by the probate court
7 having jurisdiction thereof, to wit, the probate court for the county of Middlesex in Massachusetts on May 4, 1926, and Mabel Fuller Blodgett was on that date appointed and qualified as the executrix of said will.

2. The petitioners, The First National Bank of Boston and Mabel Fuller Blodgett, are residents of Massachusetts and are the trustees of the residuary estate under article fourth of the will.

3. The petitioners, on or prior to March 15, 1928, filed with the collector of internal revenue at Boston, Massachusetts, income tax returns as such trustees on forms 1040 and 1041 with respect to the income of the trust estate for the calendar year 1928. The amount of the tax shown by their return on form 1040 to be due, to wit, $9,483.98, was paid by the petitioners to Thomas W. White, the then collector of internal revenue at Boston, who in turn turned it over to the United States.

4. Thereafter on March 21, 1931, within the time allowed by law, the Commissioner of Internal Revenue assessed against the petitioners an additional income tax for the year 1928 in the amount of $4,500.26 with interest thereon of $544.47, making a total assessment of tax and interest $5,044.73, which amount was paid by the petitioners to said Thomas W. White, the then collector of internal revenue at Boston, on April 3, 1931, who in turn turned it over to the United States.

5. Said additional assessment was based solely upon the following action of the Commissioner.

(a) The disallowance by the Commissioner of a deduction of $8,752.86, which deduction had been taken by the petitioners in determining the amount of their net income, said sum being the amount of the payments made by the trustees to Mabel Fuller Blodgett, the widow of the testator Edward E. Blodgett, under (b) and (e) of article fourth of the will, $4,800 under (b) and $3,952.86 under (e).

(b) The transfer by the Commissioner from capital net gain to ordinary income of the sum of $74,773.08. This sum represented the profit realized by the petitioners from the sale in 1928 of cer-
8 tain securities belonging to the trust estate. These securities had all been the property of the decedent and a part of his estate at the time of his death, which was more than two years before the date of sale, but they had been received by the petitioners from the executors as a part of the petitioners' share as residuary legatees within two years from the date of sale. The bases used in determining the amount of the profit, both by the petitioners and by the Commissioner, was the fair market value of such property on

the date it was transferred by the executors to the petitioners, in accordance with section 113 (a) (5) of the Revenue Act of 1928.

6. On July 29, 1931, the petitioners filed with the collector of internal revenue at Boston, Massachusetts, a claim for refund for the full amount of said additional assessment, a copy of which claim is hereto annexed and made a part hereof.

7. On January 22, 1932, the Commissioner of Internal Revenue rejected the claim in its entirety.

8. On September 1, 1933, said Thomas W. White resigned his office as collector of internal revenue and Joseph P. Carney succeeded him as such collector.

9. No other action has been had on said claim in Congress or in any of the other departments. No other action on said claim is pending in any court. No one other than the petitioners are the owners thereof or interest therein, and no assignment or transfer of this claim or of any part thereof or any interest therein has been made. The petitioners at all times have borne true allegiance to the Government of the United States and have not in any way aided, abetted, or given encouragement in rebellion against said Government.

GEORGE S. FULLER,
Attorney for Plaintiff.
FRANCIS J. W. FORD,
United States Attorney.
J. A. LYONS,
Special Assistant to the United States Attorney,
Attorneys for Defendant.

9 *Exhibit to Agreed Statement of Facts*

Know all Men by these Presents:

That I, Edward E. Blodgett, of Newton in the County of Middlesex and Commonwealth of Massachusetts, do make this my last will, hereby revoking all wills heretofore made by me.

After the payment of my just debts and funeral expenses and expenses of administration I give, devise and bequeath as follows:

FIRST. To each of the following named I give the sum set after his or her name, and direct that said sums be paid as soon as possible after my decease:

To my wife, Mabel Fuller Blodgett, one thousand ($1,000) dollars.

To my son, Robert Fuller Blodgett, five hundred ($500) dollars.

To my daughter, Ruth Blodgett Shedden, five hundred ($500) dollars.

[In margin:] E.E.B.

To my daughter, Dorothy Blodgett, five hundred ($500) dollars.

To Mrs. Fannie M. Hosley, two hundred and fifty ($250) dollars.

To John Tyler, if he be in my employ at the time of my death, one thousand ($1,000) dollars.

SECOND. To my wife, Mabel Fuller Blodgett, I give all my automobiles and their accessories and any household furniture and furnishings now on the premises 174 Temple Street, West Newton, Massachusetts, not the property of my wife, and all my clothing, jewelry, books, and other like articles of a personal nature.

THIRD. I direct that all legacy, inheritance, estate and succession taxes, under whatever law imposed, upon any devise, legacy or bequest in this will, or in any codicil hereto, shall be paid by my executors out of the residue of my estate.

FOURTH. All the rest and residue of my estate, real and personal, and wherever situated, I give, devise, and bequeath to my wife, Mabel Fuller Blodgett, and to The First National Bank of Boston, and their successor or successors, jointly, but in trust nevertheless to hold, manage, invest and reinvest the same and from the income thereof, or from the principal if necessary, to make payments, if possible and practicable, commencing within sixty days of the qualification of my executors, and to permit the use of the Wianno property as follows:

(a) To allow my said wife, Mabel Fuller Blodgett, to use the premises now owned by me at Wianno, Massachusetts, together with the furniture and fittings therein, free of all rent and other charges whatsoever, so long as she may desire to occupy them, and I hereby direct my said trustees to hold said premises, furniture, and fittings, and keep them in good order, condition, and repair; to pay all taxes, insurance, and other expense of upkeep of said property and its furnishings, but if at any time she determines not to occupy said premises, then my trustees are to rent, sell, or otherwise dispose of the property as they may see fit, and in that event, said premises and the furnishings therein, or the proceeds received from the sale thereof, are to be held as a part of trust fund by my said trustees.

[In margin:] E.E.B.

(b) To my wife, Mabel Fuller Blodgett, for her own use, four hundred ($400) dollars per month during her life.

(c) To each of my said three children, Robert Fuller Blodgett, Ruth Blodgett Shedden and Dorothy Blodgett, the sum of one hundred and fifty ($150) dollars per month during their respective lives.

(d) To Mrs. Fannie M. Hosley the sum of one hundred ($100) dollars per month during her life.

(e) To pay out the balance of the net income as often as convenient, and at least annually, in four equal shares, to my wife and my three children.

(f) On the death of my wife I direct that the share of the income given to her be added to the income payable to my three children.

(g) In the event of the death of either my daughter, Ruth Blodgett Shedden, leaving issue or of my daughter, Dorothy Blodgett, leaving issue, whether such death occur before or after the death of

my wife, I direct that such issue be paid the parent's share of the income until the death of the last survivor of my children. In the event of the death of my son, whether that occur before or after the death of my wife, he leaving issue, I direct that, until the
11 death of the last survivor of my children, his share of the income be divided equally between his issue and his widow, so long as she shall remain his widow; if said widow shall die or remarry I direct that all of said income representing my son Robert's share be thereafter paid to his issue until such time as the principal shall be divided in accordance with the provisions hereinafter made; upon the death of my said son leaving no issue but leaving a widow surviving him, I direct that the sum of one hundred and fifty ($150) dollars per month be paid to such widow until such time as she may remarry and as long as she remains his widow.

[In margin:] E. E. B.

(h) Except as above provided, in case of the death of any of my said children leaving no issue I direct that the share of such deceased child in the income of the fund shall thereafter be divided among my surviving children in equal shares (the issue of any deceased child taking the parent's share) until the termination of this trust.

(i) After the death of my said wife and the death of the last survivor of my said children, Robert Fuller Blodgett, Ruth Blodgett Shedden, and Dorothy Blodgett, I direct that the principal of the trust fund, after making provision for payment to my son's widow as herein directed, shall be divided among my grandchildren, per capita and not per stirpes; provided, that if the widow of my said son shall still be living and unmarried, I direct my trustees, before such distribution to my grandchildren, to set apart such principal sum as in the judgment of my trustees is necessary for the purpose, and thereafter to continue to pay to said widow the sum of one hundred and fifty ($150) dollars per month during her life or so long as she may remain my son's widow. On the death or remarriage of my son Robert Fuller Blodgett's widow after the decease of the last survivor of my own children, I direct that the principal of the trust fund which has been held for the purpose of paying the income provided for to her shall be in like manner divided among my grandchildren, per capita and not per stirpes.

(j) All payments under the trusts hereinbefore established are to be made to the beneficiaries personally, if convenient, or upon their respective personal receipt in writing, and in either case are to
12 be free from the interference or control of any of their creditors, and neither beneficiary is to have any power of anticipation or assignment, nor is any creditor or assignee to have any right or power to reach said payments by attachment or by any process at law or in equity.

[In margin:] E. E. B.

FIFTH. I hereby give my said trustees full power and authority in the investment, reinvestment, and management of said trust property, to sell the same, or any part thereof, at public auction or private sale,

without seeking the aid or instructions of any court, and to execute and deliver all proper deeds and other instruments of transfer without in any event making the purchaser answerable for the application of the purchase money; and for the purpose of making payment of any specific legacies given by this will, and whenever it shall become necessary to make any final distribution of any property held in trust under this will, I give my said trustees full power and authority in their discretion, if they shall deem it necessary, to mortgage and hypothecate the whole or any part of said trust property, for the purpose of realizing any cash which may be necessary for the purpose of such payment or distribution.

The trustees shall retain in the trust fund my said Wianno property and hold the same in accordance with the terms and conditions heretofore set forth, and in their discretion may retain in the trust fund any other property, real or personal, in the form of investment in which such property is received by the trustees under this will, even though the same is not a trust investment, or is unproductive of income, or is a larger proportion in one investment than the trust estate should hold, and may invest or reinvest the whole or any portion of said trust fund in any property, real, personal, or mixed, and wherever situated, in which a reasonably prudent man in like circumstances would invest his own property.

SIXTH. I nominate and appoint my wife, Mabel Fuller Blodgett, to be the executrix of this will and in case of the death of my said wife or her inability to serve as executrix I nominate my daughter, Ruth Blodgett Shedden, to act in her stead as such executrix, provided my said daughter be at the time living in the Commonwealth of Massachusetts. If my said daughter Ruth be not at such
13 time living in Massachusetts, then in such event I nominate and appoint my daughter Dorothy Blodgett, provided she be at such time living in the Commonwealth of Massachusetts, to act as such executrix. I have not nominated or suggested my son Robert Fuller Blodgett as executor of this will by reason of the fact that his service in the Army makes it seem improbable that he would be able to serve.

[In margin:] E. E. B.

SEVENTH. In case of the death of my wife, Mabel Fuller Blodgett, or the inability of either of my trustees to serve as such under this will, it is my wish that at least one trustee hereunder be nominated in accordance with such wish as may be expressed by my surviving children.

EIGHTH. I direct that my executor and trustees be exempt from giving any sureties on any bonds required of them by law as such executor or trustees.

In testimony whereof I hereunto set my hand in the presences of three witnesses, declaring this to be my last will and testament, this 3rd day of June A. D. 1925.

EDWARD E. BLODGETT. [SEAL]

On the 3rd day of June A. D. 1925 Edward E. Blodgett, of Newton, Massachusetts, signed the foregoing instrument in our presence, declaring it to be his last will, and as witnesses thereof we three do now, at his request, in his presence, and in the presence of each other, hereto subscribe our names.

FREDERICK W. EATON,
Concord, Massachusetts.
JOSEPH C. HANNON,
One Federal Street, Boston.
FREDERICK D. NICHOLS,
Taunton, Massachusetts.

[In margin:] E. E. B.

[Memorandum: Claim for refund is here omitted as it will be found printed on page 4 of this transcript of record. James S. Allen, clerk.]

Recital as to hearing

On the said sixteenth day of March A. D. 1934 said cause was set down for hearing on the agreed statement of facts, the Honorable Elisha H. Brewster, district judge, sitting.

14 Said cause was thence continued under advisement to the March term, A. D. 1934, when, to wit, May 11, 1934, the following petitioners' requests for rulings of law were filed by consent:

Petitioners' requests for rulings of law

Filed by consent May 11, 1934

[Memorandum: Copy of petitioners' requests are here omitted, as they will be found printed in the petitioners' bill of exceptions, on page 23 of this transcript of record. James S. Allen, clerk.]

In the United States District Court

Petitioners' motion for judgment

Filed May 11, 1934

Now come the petitioners and on the pleadings and evidence move that judgment be entered for the petitioners for the amount of the excess tax and interest paid by the petitioners resulting from the failure of the Commissioner to allow petitioners to deduct from their gross income the sum of $3,952.86 referred to in paragraph 5 (a) of the statement of agreed facts, and from the action of the Commissioner in refusing to permit petitioners to have their tax with respect to the sum of $74,773.08 referred to in paragraph 5 (b) of the statement of agreed facts taxed under the provisions of section 101 of the Revenue Act of 1928 and requiring that said sum be

included in the petitioners' ordinary net income subject to normal and surtaxes, and that judgment include interest as provided by law, and costs.

By their attorneys.

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.

The respondent assents to the filing of this motion at this time.

FRANCIS J. W. FORD,
United States Attorney.
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

Motion denied.

E. H. B., *D. J.*

15 In United States District Court

Recital as to respondent's request for findings of fact and ruling of law

Filed by consent May 11, 1934

[Memorandum: Copy of respondent's requests for findings of fact and rulings of law are here omitted, as they will be found printed in the petitioners' bill of exceptions, on page 24 of this transcript of record. James S. Allen, clerk.]

In United States District Court

Respondent's motion for judgment

Filed by consent May 11, 1934

Now comes the respondent and moves that, on the pleadings and evidence, any judgment entered herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph 5 (a) of the statement of agreed facts filed herein.

By its attorney.

FRANCIS J. W. FORD,
United States Attorney.
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

Recital as to further hearing

This cause was thence continued to the June term, A. D. 1934, when, to wit, August 7, 1934, the Honorable Elisha H. Brewster, district judge, sitting, said cause came on for further hearing on the agreed statement of facts and it was ordered that petitioners' request no. 1 for rulings be granted, all other requests being denied and that

the respondent's request that the court find the facts to be as stipulated and its requests for ruling of law be granted, petitioner's exception to the ruling of law being saved. It was further ordered that petitioner's motion for judgment be denied and the respondent's motion for judgment be allowed, petitioners' exceptions being saved.

On the said seventh day of August, an opinion of the court was announced, holding petitioners are entitled to recover in these proceedings.

16 This cause was thence continued to the present September term, A. D. 1934, when, to wit, September 17, 1934, a draft bill of exceptions is filed by the petitioners and assented to.

On the thirtieth day of October, A. D. 1934, the petitioners' bill of exceptions is allowed by the court.

Also, on the said thirtieth day of October, A. D. 1934, the following motion for entry of judgment is filed by the petitioners and allowed by the court:

In United States District Court

Petitioners' motion for entry of judgment forthwith

Filed and allowed October 30, 1934

Now come the petitioners and say that on August 7, 1934, this court allowed the respondent's motion that "any judgment entered herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph (5) of the statement of agreed facts filed herein", the respondent having conceded that such disallowance was erroneous and the petitioners further say that their bill of exceptions in the above-entitled cause has been allowed.

Wherefore, the petitioners move that judgment be entered for them forthwith in the amount of $979.15 (the respondent having agreed that said sum is the excess payment resulting from such disallowance), with interest thereon as provided by law from April 3, 1931, and costs.

By their attorneys,

BURNHAM, BINGHAM, PILLSBURY, DANA, & GOULD,
GEORGE S. FULLER.

October 30, 1934, allowed.

E. H. B., *D. J.*

In United States District Court

Judgment

Thereupon, to wit, October 30, 1934, it is considered by the court, the Honorable Elisha H. Brewster, district judge, sitting, that the

said the First National Bank of Boston and Mabel Fuller Blodgett, trustees u/w Edward E. Blodgett, recover of the said the
17 United States of America, respondent, the sum of nine hundred seventy-nine dollars and fifteen cents ($979.15) damages together with interest thereon as provided by law from April 3, 1931, and their costs of suit taxed at

In United States District Court

Opinion of the court

August 7, 1934

[7 Fed. Supp. 915]

BREWSTER, J.: This action is brought by trustees under a will to recover an additional income tax assessed for the year 1928. The additional assessment was due, in part, to the refusal of the Commissioner to allow, as a deduction from income, $8,752.86 paid by the trustees to the widow of the testator under certain provisions of the will. The differences respecting the rights to this deduction have been disposed of by the case of Helvering v. Butterworth, 290 U. S. 365. It is now conceded that the sum of $4,800 was properly disallowed, and that the balance of $3,952.86 should have been deducted.

A controversy arises over the action of the Commissioner in transferring from capital net gain to ordinary income subject to normal and surtaxes the sum of $74,773.08. This sum represents the gain realized by the trustees from the sale in 1928 of certain securities which had been a part of the testator's property at the time of his death and which had been received by the trustees from the executrix within less than two years from the time of the sale in 1928.

In arriving at the amount of the profits arising from the sale, both the petitioners and the government have taken as a cost basis the market value on the dates when the securities were received by the trustees from the executrix. The testator, Edward E. Blodgett, died April 4, 1926, more than two years before the sale by the trustees. The pertinent sections of the Revenue Act of 1928 are as follows:

"Sec. 101. Capital Net Gains and Losses

"(a) Tax in case of capital net gain.—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there
18 shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: A partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain. . . .

"(c) Definitions.—For the purposes of this title—

"(1) 'Capital gain' means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921. . . .

"(8) 'Capital assets' means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition— . . . .

"(B) In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person."

"Sec. 113. Basis for Determining Gain or Loss

"(a) Property acquired after February 28, 1913. The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that— . . .

"(5) Property transmitted at death. If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent.

If the property was acquired by the decedent's estate from the
19 decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases, if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust insrument had been a will executed on the day of the grantor's death; . . ."

The decisive question involved here is whether the securities sold by the trustees come within the definition of capital assets under section 101 (c) (8) as property held by the taxpayer for more than two years. It is the petitioners' contention that since property of a decedent which is received by a legatee or distributee is acquired by him at the date of his death (Brewster *v.* Gage, 280 U. S. 327) it follows that the property was held by the trustees for more than two years.

Under the earlier revenue acts, the Board of Tax Appeals and the courts had held that the provisions of law fixing the basis for determining gain or loss and those laying a tax on capital gains were quite independent of each other, with the result that the date of acquisition by the former owner was taken as a basis for arriving at the gain or loss, while the date of acquisition of the succeeding owner controlled his rights to the benefits of the capital gain sections of the law. Johnson *v.* Com'r of Internal Revenue, 52 F. (2d) 726; Schoenberg *v.* Burnet, 55 F. (2d) 543.

A contrary rule was adopted in the Second Circuit in New York Trust Co. *v.* Com'r of Internal Revenue, 68 F. (2d) 19, which case was affirmed by the Supreme Court in Helvering *v.* New York Trust Co., — U. S. —, 78 L. Ed. 960. That case, which arose under the Revenue Act of 1921, involved property received as a gift by way of trust. The statute (sec. 202 (a) (2)) definitely prescribed that the basis for determining gain or loss should be the same as that which it would have in the hands of the donor. It was there held that, although the donee had acquired the gift less than two years before the sale of the subject matter of the gift, the gain could nevertheless be taxed under the capital gain provisions of the act (sec. 206 (b)).

In that case the court refers to the fact that the Commissioner had combined periods in which the shares were held by the trustor and the trustee, respectively, for the purpose of ascertaining the taxable gain, but had ascertained the applicable rate by breaking the continuity. It then said:

"Sections 202 (a) and 206 (a) (6) are included in the same act and are applicable respectively to different elements of the same or like transactions, and are not to be regarded as wholly unrelated. While undoubtedly legally possible and within the power of Congress, the methods adopted and results attained by the Commissioner are so lacking in harmony as to suggest that the continuity required to be used to get the base was also intended for use in finding the rate. No valid ground has been suggested for requiring tenures to be added for the one purpose and forbidding combination for the other. The legislative purpose to be served by the application of the lower rate upon capital gains is directly opposed to the Commissioner's construction. There is no ground for discrimination such as that to which the trustee was subjected. It is to be inferred that Congress did not intend penalization of that sort."

By 1928 the revenue laws had undergone material modifications with respect to the basis for determining gain and loss, and the words "capital assets" had been more particularly defined. Under earlier acts, down to and including the Revenue Act of 1926, the basis for determining the gain or loss resulting from the sale of property acquired by bequest, devise or inheritance, was the fair market value of the property at the time of such acquisition (Revenue Act of 1926, sec. 204 (a) (5)), and under the rule laid down in Brewster *v.*

Gage, supra, there can be no doubt that the time of acquisition was the date of the death of the testator. In 1928 the law was changed so that the basis for determining gain or loss arising from
21 the sale of property transmitted at death, in cases such as the one with which we are here concerned, was the fair market value at the time of the distribution to the taxpayer. The petitioners and the respondent both concede that the gain was properly determined by using as the cost of the property the fair market value of the property at the time it was turned over to the trustees.

The provisions relative to net capital gains and losses also underwent changes. In the act of 1926, for the first time, there appear provisions elaborating the definition of capital assets and these elaborations were carried forward in the Revenue Act of 1928. It is said in Helvering v. New York Trust Co., supra, that these additional provisions were merely declaratory of the prior law, the purpose of which was to clarify what was doubtful as to existing law. But whether the law is old or new, the provisions of section 101 (c) (8), (B) govern the rights of the petitioners. There can be no room for misapprehension as to what the law was in 1928. In determining the two-year period, during which the taxpayer must hold property in order that it come within the definition of "capital assets", the period for which the property was held by any other person was to be included only if, under the provisions of section 113, the property, for the purpose of determining gain or loss from the sale, has the same basis in his hands as it would have in the hands of such other person. Section 113 is the section dealing with rules for determining gain or loss. Under the provisions of that section, the property sold by the petitioners did not have in their hands the same basis for determining gain or loss that it would have had in the hands of the executrix. If the executrix had sold the securities involved here, the cost would have been the fair market value at the time of death (Commissioner v. Stearns, 65 F. (2d) 371), whereas by virtue of section 113 the cost was the fair market value at the time of the distribution. Clearly, therefore, the petitioners' case does not fall within the terms of section 101 (c) (8), (B).

The apparent purpose of the extended definition of capital assets was to avoid the unjust consequences which flowed from the earlier definition as the law was construed and applied by some of the appellate courts and the Internal Revenue Department. If
22 the period of ownership of the next preceding owner was to be included for the purpose of ascertaining gain and loss, it was also to be added for the purpose of fixing the rate of the tax. In my opinion, Congress intended that the converse should be equally true. It would seem to follow, as a necessary corollary, that if the continuity of successive ownerships is to be broken for the one purpose, it is also to be broken for the other.

This conclusion would seem to be in complete harmony with Helvering v. New York Trust Company, supra, and recent decisions

of the Board of Tax Appeals. Dibblee v. Com'r, 29 B. T. A. 1070; Nancy K. McFeely, 29 B. T. A. 998.

In order to reach the result, it has not been necessary to combine periods of ownership of two owners for one purpose and to break the continuity for another. The same date is resorted to both for the purpose of determining the gain and for determining the rate of the tax applicable to the gain.

So far as the petitioners' argument is predicated upon the decisions of the Board of Tax Appeals, and the uniform administrative construction of the capital gain section prior to the 1928 act, it has been much weakened by the observation of Mr. Justice Butler, in speaking for the court in Helvering v. New York Trust Co., supra.

In view of the Government's concession that $3,952.86 was improperly disallowed, the petitioners are entitled to recover in these proceedings. I have no doubt the parties can agree as to the extent of the Government's liability, if determined according to this opinion. If they cannot so agree, the case may stand for hearing as to the amount of the judgment.

In United States District Court

Petitioners' bill of exceptions

Filed September 17, 1934; allowed October 30, 1934

This was a petition by The First National Bank of Boston et al., trustees under the will of Edward E. Blodgett, late of Newton, in the district of Massachusetts, against the United States to recover
Federal income taxes alleged to have been erroneously and
23 illegally assessed and collected in the amount of $5,044.73, with interest from April 3, 1931.

The case was tried before Brewster, J., on March 16, 1934, on the pleadings and a statement of agreed facts, which are hereby referred to and made a part hereof.

The foregoing constitutes all the evidence in the case.

At the trial, the petitioners requested the court to make the following rulings of law:

Petitioners' requests for ruling of law

"1. That the petitioners were entitled to a deduction from their gross income of the sum of $3,952.86 referred to in paragraph 5 (a) of the statement of agreed facts in determining the amount of their net income for the year 1928 subject to normal and surtaxes.

"2. That the securities, the gain from the sale of which is referred to in paragraph 5 (b) of the statement of agreed facts, constituted 'capital assets' of the petitioners within § 101 of the Revenue Act of 1928.

"3. That the sum of $74,773.08, referred to in paragraph 5 (b) of the statement of agreed facts, constituted 'capital net gain' under § 101 of the Revenue Act of 1928.

"4. That the petitioners were entitled to have their income tax for the year 1928 with respect to the sum of $74,773.08 referred to in paragraph 5 (b) of the statement of agreed facts taxed under the provisions of § 101 of the Revenue Act of 1928 rather than have said sum included as a part of its ordinary net income subject to the normal and surtaxes under said Act."

At the trial, petitioners also filed the following written motion for judgment:

Petitioners' motion for judgment

"Now come the petitioners and on the pleading and evidence move that judgment be entered for the petitioners for the amount of the excess tax and interest paid by the petitioners resulting from the failure of the Commissioner to allow petitioners to deduct from their gross income the sum of $3,952.86 referred to in paragraph 5 (a) of the statement of agreed facts and from the action of the Com-
24 missioner in refusing to permit petitioners to have their tax with respect to the sum of $74,773.08 referred to in paragraph 5 (b) of the statement of agreed facts taxed under the provisions of section 101 of the Revenue Act of 1928 and requiring that said sum be included in the petitioners' ordinary net income subject to normal and surtaxes, and that judgment include interest as provided by law, and costs."

The respondent at the trial requested the court to make the following ruling of law:

Respondent's requests for ruling of law and for judgment

"The respondent requests the court to find as a matter of law that the securities in question not having been 'held' by the taxpayer for more than two years did not constitute capital assets within the meaning of section 101 (c) (8) of the Revenue Act of 1928, and that the gain on the sale of said securities was properly computed by the Commissioner of Internal Revenue as ordinary income."

And also filed the following written motion for judgment:

"Now comes the respondent and moves that on the pleadings and evidence, any judgment entered herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph 5 (a) of the statement of agreed facts filed herein."

The trial was continued generally and on August 7, 1934, during the course thereof, the court found the facts to be as set forth in the statement of agreed facts and granted the petitioners' request no. 1, the same having been conceded by the respondent. The court then denied the rest of the petitioners' said requests for rulings of law and

also denied the petitioners' motion for judgment, and the petitioners duly claimed their exceptions thereto and the same were saved by the court. The court then also granted the respondent's request for ruling of law, and the respondent's motion for judgment, and the petitioners duly claimed their exceptions thereto and the same were saved by the court.

25 On the same day the court handed down a written opinion, which is hereby referred to and made a part hereof, in which it held that the securities, the gain ($74,773.08) from the sale of which was referred to in paragraph 5 (b) of the statement of agreed facts, did not constitute "capital assets" of the petitioners within section 101 of the Revenue Act of 1928, and that said gain did not constitute "capital net gain" to the petitioners under section 101, but constituted ordinary net income, taxable at the normal and surtax rates under said act.

In the course of its opinion, the court ruled that the provisions of section 101 (c) (8) (B) of the Revenue Act of 1928 govern the rights of the petitioners, and it also in effect ruled that the petitioners did not hold the securities in question from the date of the decedent's death, but that they "held" them (within the meaning of the word "held" as used in said section 101 (c) (8)) only from the date when the securities were distributed to them by the executors of the decedent's estate, and that they were "held" by another person or persons, to wit, said executors, from the date of the decedent's death to such date of distribution. To each of these rulings the petitioners also except.

The petitioners, being aggrieved by the denial of the court of their said requests for rulings of law and of their said motion for judgment, and being further aggrieved by the granting by the court of the respondent's request for ruling of law and the respondent's motion for judgment, and by the rulings of the court in its opinion, now except thereto and bring this bill of exceptions and pray that it may be allowed.

By their attorneys.

GEORGE S. FULLER,
BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.

Assented to.

FRANCIS J. W. FORD,
United States Attorney.
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

26 *Order allowing bill of exceptions*

Allowed October 30, 1934.

ELISHA H. BREWSTER,
United States District Judge.

Recital as to order allowing appeal

From the foregoing judgment the petitioners claim an appeal to the United States Circuit Court of Appeals for the First Circuit on November 7, 1934, said appeal being allowed by the court on the same day.

Recital as to bond on appeal

On the fourteenth day of November, A. D. 1934, a bond on appeal for costs in the sum of two hundred and fifty dollars ($250) was filed by the petitioners, the Fidelity and Deposit Co. of Maryland acting as surety. Said bond on appeal was approved by the court on the fifteenth day of November 1934.

In United States District Court

Assignment of errors

Filed November 7, 1934

The petitioners, in connection with their petition for appeal, make the following assignment of errors which they aver occurred in the trial of this case, to wit:

1. The district court erred in holding that the gain ($74,773.08) from the sale of securities referred to in paragraph 5 (b) of the statement of agreed facts did not constitute "capital net gain" to the petitioners taxable under section 101 of the Revenue Act of 1928, but constituted ordinary net income taxable at the normal and surtax rates under said act.

2. The district court erred in granting the respondent's motion that any judgment herein for the petitioners be limited to the excess payment resulting from the disallowance by the Commissioner of Internal Revenue of a deduction of $3,952.86 as set forth in paragraph 5 (a) of the statement of agreed facts.

By their attorneys.

BURNHAM, BINGHAM, PILLSBURY, DANA & GOULD.
GEORGE S. FULLER.

Recital as to citation and service

A citation on appeal was issued on the fifteenth day of
27 November, A. D. 1934, being returnable in the United States Circuit Court of Appeals on December 15, 1934. Service of said citation was duly acknowledged by counsel for the respondent.

[Clerk's certificate to foregoing transcript omitted in printing.]

28 [Minute entry of hearing, Jan. 8, 1935, omitted in printing.]

29 In United States Circuit Court of Appeals for the First Circuit

October term, 1934

No. 2984

THE FIRST NATIONAL BANK OF BOSTON ET AL., TRUSTEES, PETITIONERS, appellants

v.

UNITED STATES OF AMERICA, DEFENDANT, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, AND MORTON, JJ.

Opinion of the court

March 9, 1935

WILSON, J.: This is an appeal from a judgment of the District Court of Massachusetts on a petition to recover a refund of $5,044.73 alleged to have been illegally assessed and collected of the petitioners as taxes on income of a trust for the calendar year 1928.

The Commissioner included in the income of the petitioners as subject to the normal and surtax the sum of $74,773.08, as gain from the sale of securities which the petitioners claim have been held by them for more than two years and should have been treated as capital gain under sec. 101 of the Revenue Act of 1928.

It is also urged that the Commissioner erroneously disallowed as a deduction from the income of the trust the sum of $8.752.86 which the trustees claimed should be allowed as income distributed by the trustees to the beneficiary under sec. 162 (b) of the Revenue
30 Act of 1928. Of this item, it is conceded, as we understand it, that the Commissioner did erroneously disallow the sum of $3,952.86, which should have been deducted from the gross income received by the trust, it being a part of the trust income to be distributed currently to the beneficiary under the terms of a testamentary trust; and that by reason of this error there was an overpayment of $979.15 for which judgment was given in the district court.

The district court disallowed the claim of the petitioners that the gain in the sale of securities amounting to $74,773.08 should be considered as a capital gain, and held that it was a part of the income of the petitioners subject to the normal and surtax provisions. This is the only issue now before this court.

Edward E. Blodgett died April 4, 1926. By his will he bequeathed to the petitioners as trustees the residuum of his estate consisting, in part, at least, of securities. Sometime after April 4, 1928, and more than two years after the testator's death, but less than two years after they were turned over to the trustees by the executor of the will, some of the securities were sold by the trustees at a gain of $74,773.08 over their value at the time of distribution, which value, under sec. 113 (a) (5) of the Revenue Act of 1928, was the basis for determining gain or loss in case of residuary bequests.

The petitioners contend that under the rule laid down in Brewster v. Gage, 280 U. S. 327, as to the date of acquisition, and according to the laws of Massachusetts, the securities had been held by the trustees for more than two years and the gain was, therefore, a capital gain and should have been taxed as such under sec. 101 (a) of the act of 1928. The Government, however, contends that Congress has a right to determine what shall be considered capital assets and the basis for determining gains and losses; and that, inasmuch as the basis for determining the gain or loss in case of a sale of per-
31 sonal property acquired under a residuary bequest is fixed in sec. 113 (a) (5) of the same act as the value at the time of distribution, Congress must have intended that in such case the date from which the two-year period is to be computed is also the date of distribution. The Government also contends, since the provisions of sec. 101 (c) (8) B provide that, in determining the period during which a taxpayer has held property, there shall also be included the period for which such property has been held by any other person, provided that under the provisions of sec. 113 such property has for the purpose of determining gain or loss the same basis, in whole or in part, in the hands of the taxpayer as it would have had in the hands of such other person, that the period during which these securities were held by the executor cannot be added to the time in which they were held by the trustees; since the basis for computing the gain, if sold by an executor, is the value at death of the testator, while in the case of the residuary legatee it is the date of distribution.

It should be noted, however, that the reference in sec. 101 (C) (8) B is not alone to para. (a) (5) of sec. 113, but to the entire section, which contains other instances of the arbitrary fixing of the base value for determining gains and losses. This contention of the Government is evidently based on the theory that a legatee acquires title from the executor; but since a legatee, whether special or residuary, does not acquire his title from the executor, but under the will, Brewster v. Gage, supra; Chandler v. Field, 63 Fed. (2d) 13, 15, certiorari denied, 289 U. S. 758; Davis v. Newton, 6 Met. 537, 541; Hooper et al. v. Bradford, 178 Mass. 95, 97, sec. 101 (c) (8) B has no application to this case. Personal property transmitted at death is not held by the representatives of the estate within the meaning of sec. 101 (c) (8) B. The executor or administrator can only be said to hold it for the limited purpose of administration, or, as has been said, in autre droit, or as a quasi trustee for

the benefit of the legatees or heirs. Lathrop v. Merrill, 207 Mass. 6, 10.

32 In Brewster v. Gage, supra, the court said, p. 334:

"Immediately upon the death of the owner there vests in each of them (referring to a legatee or heir) the right to his distributive share of so much as shall remain after proper administration and the right to have it delivered upon entry of the decree of distribution * * * Upon acceptance of the trust there vests in the administrators or executors, as of the date of the death, title to all personal property belonging to the estate; it is taken, not for themselves, but in the right of others for the proper administration of the estate and for distribution of the residue. The decree of distribution confers no new right; it merely identifies the property remaining, evidences right of possession in the heirs of legatees and requires the administrators or executors to deliver it to them. The legal title so given relates back to the date of the death."

It is clear that acquisition as used in these acts means acquisition of title and not of possession.

As the Committee on Ways and Means pointed out in its report to the House #704 on the Revenue Act of 1934, with respect to the change in sec. 113 (a) (5) of the pending bill from that of the act of 1928:

"The change in the 1928 act was made because there was some doubt as to the meaning of the term 'acquisition', which was the term used in the act of 1926. Since the 1928 act was passed, the Supreme Court has defined the 'date of acquisition' to mean the date of death in the case of all property passing by bequest, devise or inheritance, whether real or personal. (Brewster v. Gage, 280 U. S. 327.) Sec. 113 (a) (5) of the bill conforms to the language contained in the act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal."

In the 1921 act, sec. 206 (a) (6), it was provided that to constitute capital assets, property must be "acquired and held" for two years. In subsequent acts the word "acquired" has been omitted, the obvious reason is that the word "acquired" was surplusage, since, in general, property is held from the time it is acquired or one's ownership begins.

A comparison of corresponding sections in prior acts: Secs.
33 206 (a) (6), and 202 (a) (3) of the 1921 act; secs. 208 (a) (8) and 204 (a) (5) of the 1924 act; secs. 208 (a) (8) and 204 (a) (5) of the 1926 act, discloses that capital assets are determined by the time property is "held", while gains and losses are computed from the value as a base at the time of acquisition, except in certain instances of an arbitrary fixing of the base value. It was not until the insertion of sec. 113 (a) (5) in the 1928 act that any change was made in the base for computing gains between personal property transmitted at death by special bequest and by residuary bequests.

It is significant, however, that even in para. (a) (5) of sec. 113 of the 1928 act, notwithstanding the arbitrary fixing of the base value as of the date of distribution in case of a residuary bequest, it is recognized that personal property transmitted at death is acquired either by will or by descent. It expressly provides that, "If personal property is acquired by specific bequest", etc., and "in all other cases, if the property was *acquired either by will or intestacy.*" (Italics supplied.)

Sec. 101 and sec. 113 were enacted for entirely different purposes. The first defines capital assets and capital gains; the second defines the method of determining the amount of gains, whether capital gains or income. They are not interdependent in the sense that the date from which gains and losses are computed must in all cases be the same as when the property was acquired by the taxpayer.

In other words, Congress intended only by the change in sec. 113 (a) (5) of the 1928 act to make clear the base value for determining gains and losses in case of property transmitted at death, because of some uncertainty which had arisen in the administrative bureau as to date of acquisition of such property. It, however, made no substantial change in sec. 101 of that act from the provisions of sec. 208 (a) (8) of the 1926 act for determining what are capital assets.

In view of the purpose, which has repeatedly been recog-
34 nized both by the administrative bureau and the courts of allowing a gain from the sale of property held for more than two years to be taxed as a capital gain, we do not think a narrow construction should be given to any provision in the revenue acts that would tend to defeat such purpose, unless it clearly follows from the language used. It should not be done by implication as here contended by the Government in construing sec. 113 (a) (5) of the 1928 act. It cannot be said to be a necessary implication that when Congress, in order to clarify some uncertainty as to the date of acquisition of residuary bequests, fixed the base date for computing gains in case of the sale of personal property so acquired as the date of distribution, it also intended thereby to limit the period during which such property was held. It is inconceivable, we think, that if Congress intended by sec. 113 (a) (5) of the act of 1928 to effect a change in the period during which property acquired by will or inheritance must be held to constitute capital assets, it would not also have made an equally definite change in sec. 101 of that act.

There is nothing new in fixing an arbitrary date for determining the base value for computing gain or loss in the sale of property and different from that when the property was acquired by the taxpayer. In case of property purchased prior to 1913, it was fixed as of March 1, 1913, unless the cost price was in excess of their value on that date; also see sec. 208 (a) (8) of the 1926 act, and see sec. 113 (a) (1) (2) (3) (4) (6) of the 1928 act.

We find nothing in the decisions in Helvering v. New York Trust Co., 292 U. S. 455, or Helvering v. Bliss, 293 U. S. 144, which mod-

ifies the rule laid down by the Supreme Court in Brewster v. Gage, supra, in construing the sections of the earlier acts corresponding to sec. 113 (a) (5). Under the rule laid down in Brewster v. Gage, supra, we think the petitioners acquired the corpus of the trust on April 4, 1926, and therefore held it more than two years prior to the sale, and that the District Court erred in holding that under the provisions of sec. 101 (c) (8) B of the 1928 act, the
35 taxpayer had not held the securities sold since the death of the testator.

The gain of $74,773.08 resulting from the sale of securities by the trustees, therefore, should have been treated as a capital gain, and in order to determine the total amount to which the petitioners are entitled as a refund, the case must be remanded for a recomputation of the tax in accordance with this opinion.

The judgment of the District Court is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

In United States Circuit Court of Appeals

Judgment

March 9, 1935

This cause came on to be heard January 8, 1935, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, March 9, 1935, here ordered, adjudged, and decreed as follows: The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Recital as to issuance of mandate

Thereafter, to wit, on April 9, 1935, mandate issued.

[Clerk's certificate to foregoing transcript omitted in printing.]

37 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is assigned for argument immediately following No. 24.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 39,664. U. S. Circuit Court of Appeals, First Circuit. Term No. 110. The United States of America, petitioner, vs. The First National Bank of Boston et al., Trustees, etc. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1935. Term No. 110 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE, 1935